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No. 09-626

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Thomas, Glenna and Kayla Loch,

Petitioner,

v.

Edwardsville Community Schools, District No. 7,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The Individual with Disabilities in Education Act ("IDEA")'s promise of a free appropriate public education ("FAPE") provided in accordance with an individual education plan ("IEP") is stripped of its vitality when children intended to benefit from the Act do not receive the law's benefits. While the Respondent seeks to persuade this Court by reframing the Petitioners' questions, the Respondent has not, and cannot, contest the overriding importance of the Petitioners' questions involving IDEA eligibility, a statutory privilege which affects thousands of disabled children and their ability to access educational services — in order to benefit from their public education.

The Respondent is also wrong in asserting the circuit courts are applying "one comprehensive standard of review" in IDEA cases involving a child's eligibility. The court of appeals are split concerning this issue. Four circuits conduct a de novo review, while three others utilize the "clear error" (abuse of discretion) standard. *See* Pet. at 18. Apart from the circuit split over it, the importance of the Petitioners' question, even presented alone, should warrant this Court's review.

Respondent also attempts to characterize this case as an improper vehicle for deciding the questions presented. But none of its assertions, even if factually correct, establishes that there are any inpediments to this Court conclusively deciding the important question of federal law presented, which continues to divide the circuit courts and deny certain disabled children the

Act's express guarantee — of a free appropriate public education for "*all* children with disabilites."

1. The Respondent's Restatement Of Questions Presented Do Not Accurately State The Issue

Rather than answer the questions presented, the Respondent seeks to avoid the questions and reposition this case as a noncontroversial matter regarding whether the *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982) decision is still valid. *See* BIO at 14. The Respondent's answer, to their own question, that "no circuit split" exists regarding "this issue" (*i.e.*, the validity of *Rowley*) is simply an attempt to mischaracterize the scope and importance of the Petitioners' questions.

The validity of *Rowley* has never been in doubt, however, the applicability of *Rowley*, specifically its "due weight" deference and educational benefit analysis — in the judicial evaluation regarding a child's IDEA eligibility, is part of the larger question being raised by the Petitioners. *See* Pet. at 29. This case squarely presents the question whether the "clear error"[1] standard of review is appropriate in the judicial review of an educational agency's denial of IDEA eligibility. Contrary to the Respondent's

[1] "While the Seventh Circuit uses the term 'clear error' to denote the deferential standard . . . we think the preferable term is 'abuse of discretion.' See *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). 'Clear error' is a term of art derived from rule Rule 52(a) of the FRCP, and applies when reviewing questions of fact." *Ornelas et al. v. United States*, 517 U.S. 694-95 (1996)

assertions, this issue has bedeviled the circuit courts, causing a well defined 4-3 split.

2. The Court Of Appeals Split Is Real, Intractible, And Warrants This Court's Intervention

The Respondent contends that "the *Rowley* standard of review . . . applies to all cases arising under the IDEA," see BIO at 17. They cite several court of appeal cases in support of their claim[2] (*see id.*, 15–23), but offer no authority in coming to this conclusion. The Repondent's claim that a "multi-tiered review" involving "one comprehensive judicial standard of review [being] uniformly applied by the circuit court of appeals" is misfounded.

In IDEA eligibility cases, which involve statutory criteria, four court of appeals conduct a de novo standard of review when evaluating such cases, as a mixed question of law and fact. *See* Pet. at 18. In a direct split, the Fourth, Seventh and Ninth circuits apply a "clearly erroneous" or abuse of discretion review. They treat the denial of IDEA eligibility as [primarily] a question of fact, and accord 'due weight' to the agency's findings. *See* Pet. at 23-26. The Respondent's contention, that the "*Rowley* Court" determined the proper "judicial standard to apply" in "all cases arising under the IDEA" (see BIO at 16-17), is misplaced, and is contradicted by the 4-3 split

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[2] Of the 48 appellant court cases cited by the Respondent, 45 were cases involving sufficiency of a child's IEP, the provisions of FAPE or an LRE/placement issue. Only 3 of the cases cited involved IDEA eligibility.

among the circuits.

A determination that a child is not a child with disability is a mixed question of law and fact, and involves statutory and regulatory definitions applied to facts surrounding the child's disabilities and educational needs. The Respondent's assertion that, "[w]hether the issue at judicial review is the appropriateness of a student's IEP, a hearing officer's award for reimbursement, or a student's eligibility for special education and related services, the *Rowley* standard of review still applies" *see* BIO at 17 (case references omitted) is simply wrong and incorrectly presumes the *Rowley* "due weight" deference is required in all cases. Contrary to the Respondent's assertions, at least four court of appeals have held that both reason and the law militates requiring *Rowley* deference to an agency's decision denying IDEA eligibility. *See* Pet. at 26-28.

3. The *Rowley* "Due Weight" Deference Is Not Applicable In Testing For IDEA Eligibility

The Responent's claim that an inquiry into whether a child is eligible for IDEA access is identical to that of whether a child is receiving an "appropriate" education is misplaced and certainly not a result of *Rowley*. The "*Rowley* standard" for determining the appropriateness of a child's IEP and its ensuing deference was accorded because of the factfinder's inherent expertise on "technical matters foreign to the experience of most courts." See *Young v. Romeo*, 457 U.S. 307, 323 (1982) (citing *Bell v. Wolfish*,

441 U.S. 520, 544 (1979), and its observation that "[c]ourts should not second-guess the expert administrators on matters which they are better informed."

In *Rowley*, this Court faced the issue of "what is meant by the [IDEA's] requirement of a 'free appropriate education.'" *Id.* at 186. "*Rowley* focused on the *level* of services and the quality of programs that a *state* must provide, not the criteria for *access* to those programs. *Id.* at 189, 202." *Timothy W. v. Rochester N.H. High Sch. Dist.*, 875 F.2d 971 (CA1 1989).

Inapposite, the Petitioners' question involves the appropriate standard of review for IDEA cases involving the denial of access. While the propriety of an IEP hinges on whether it provides FAPE, as defined by this Court in *Rowley*, IDEA eligibility hinges on whether the child is a "child with a disability," in accordance with the statute,[3] and federal and state regulations. The child's disability must "adversely affect [their] educational performance," per 34 C.F.R. § 300.8(c)(4)(i) and (c)(9)(i) and, by reason thereof "need special education and related services" 34 C.F.R. § 300.8, in accordance with the State's plan.

An IDEA eligibility dispute doesn't involve a child's IEP, (the child has never received one), the agency's educational methodologies or the agency's expertise. It strictly involves the child's statutory guarantee to receive a 'free appropriate public education' in accordance with the Act.

No authority from *Rowley* imposed requirements of "due weight" upon the court of

[3] See 20 U.S.C. § 1401(3)(A)(1)(i)

appeals when testing for IDEA eligibility. Further, this Court in both *Cedar Rapids Comm. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999) and *Irving Indep. Sch. Dist. v. Tatro*, 486 U.S. 883 (1984) emphasized that meaningful access to a public education was the primary purpose of the IDEA, and reiterated the undisputed fact that the services at issue must be provided, if the students in question were going to remain in school.

4. Under IDEA, Eligibility Is Determined In Compliance With Federal and State Regulations – The Majority Of Circuits Review As A "Mixed Question Of Law and Fact"

Whether a student qualifies as "a child with disability" under § 1401(3) poses a mixed legal and factual inquiry. "[W]hether district court accurately applied statutory and regulatory terms in IDEA and Vermont implementing regulations to J.D.'s educational and emotional history is a mixed question of law and fact, which we review de novo." *J.D. ex rel. J.D. v. Pawlet School Dist.*, 224 F.3d 60 (CA2 2000).

34 C.F.R. § 300.304 requires the use of "variety of assessment tools and strategies to gather relevant functional, developmental, and academic information . . . in determining whether the child is a child with disability under § 300.8."

A. The *Rowley* "Educational Benefit" Analysis Is Not Applicable In Determining A Child's Eligibility For Special Education

In IDEA eligibility testing, a child's need for special education and related services is determined in accordance with the State's plan — not in accordance with *Rowley*. A determination that a child is not a child with disability because they were "achieving" in light of the *Rowley* educational benefit measurement, (i.e., passing grades and academic performance) is misplaced and fails to take into account the State's education performance requirements.[4] See Pet. at 29-32.

The Respondent's contention that the *Rowley* educational benefit may be a consideration in deciding a child's need for special education is completely off the mark. *See* BIO at 26. The extent a child's disability exerts an adverse effect on their educational performance is measured by the state's criteria. *See Mr. I v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 9 (CA1 2007). Though the IDEA "establishes a basic floor of education" for children with disabilities,

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[4] In the Petitioner's case, the educational agency found the child was ineligible for services because it alleged her diabetes and emotional issues did not adversely affect "her ability to make *educational progress*." (See. Pet. at A103). In coming to this decision, the agency inappropriately narrowed the scope of its inquiry to the child's academic progress, and did not consider her social emotional difficulties (a requirement) under the State's educational performance standard.

guaranteeing them "[a] free appropriate public education," 20 U.S.C. § 1412(a)(1)(A), it does not displace the states from their traditonal role in setting their own educational policy. *See Burlington,* 736 F.2d at 788-89; *see also J.D.*, 224 F.3d at 65; *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (CA5 1989).

The Department of Education has issued regulatory definitions, outlining each of the qualifying disabilities, and, with one exception, they must "adversely affect [ ] a child's educational performance." *Id.* § 300.8(c)(1)-(c)(13). The regulation does not expand on this phrase, nor does it defer to *Rowley*. Instead, it leaves "to each State to give substance to these terms." *J.D.*, 224 F.3d at 65.

Whether the balance of these factors tips towards eligibility depends on the manner in which the specific disability afflicts the student and adversely effects the child's "educational performance," as determined within the State's plan. In Illinois, educational performance[5] is defined as;

> "[a] student's academic achievement and ability to establish and maintain social relationships and to experience a sound emotional development in the school environment."

The Respondent's reliance on *Rowley's* educational benefit analysis — and the appellate courts[6] who utilize this measurement in their

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[5] See Illinois Admin. Code Tit. 23 § 226.75

[6] The Fourth, Seventh and Ninth circuits.

IDEA eligibility testing, are making a categorical mistake. See Pet. at 29. This Court refused to "establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the [IDEA]," *id.* at 202, and explictly stated the intent of the [Act] was to provide "*access* to specialized instruction and related services." *Id.* at 201. Further, this Court clarified that the *Rowley* decision wasn't applicable in cases involving IDEA eligibility;

> "[B]ecause in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation." *Id.* at 202.

5. The Clear Error/Abuse of Discretion (i.e., "*Rowley* Standard") Is Inappropriate For Issues Involving Statutory Interpretation – The Circuit Split Exists As A Result

The Petitioners' have alleged their school district has failed to fulfill its statutory obligations under the IDEA. Within its narrow framework — of strict deference to the state decision-makers, (in accord with *Rowley),* the Fourth, Seventh and Ninth circuits[7] begin their IDEA judicial review by looking at the adequacy

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[7] In *Winkelman*, 127 S.Ct. at 2000, this Court recognized that a "proper interpretation" of IDEA "requires a consideration of the entire statutory scheme."

of the factual findings at the district court level. Only a determination of historical facts is involved at this point, and looking for adequate factual findings made by the district court and reviewing them for "clear error" is a task all the circuits complete — regardless whether they use a de novo, modified de novo or a clear error review standard.

The circuit court split occurs with the second part of the analysis. Unlike their counterparts, the Fourth, Seventh and Ninth circuits review the district court determination for "clear error" (or abuse of discretion) and consider a denial of IDEA eligibility (whether a child is a "child with disability") as primarily a question of fact.[8]

In a direct split, the remaining circuits treat such findings as a "mixed question of law and fact" and apply statutory criteria to the examination of IDEA eligibility. *See Timothy W.*, 875 F.2d 954, 961, *cert denied*, 493 U.S. 938, 110 S.Ct. 519, 107 L.Ed.2d 520 (1989); *Yankston Sch. Dist. v. Schramm*, 93 F.3d 1369, 1374 (CA8 1996) and *Weixel v. Bd. of Educ.*, 287 F.3d 138, 150 (CA2 2002) ("IDEA's coverage is not limited to students with 'learning disabilities' . . ."). In addition, these remaining circuits traditionally conduct a de novo review regarding matters involving statutory implications. "[S]tatutory interpretation questions are issues of law, which we review de novo." *Ammex Inc. v. United States*, 367 F.3d 530, 533 (CA6 2004).

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[8] Contrary to the Respondent's assertion, the Seventh Circuit did not review the Petitioners' case under the de novo review standard – see Pet. at A-7.

Further, this Court has previously instructed the Seventh Circuit of this requirement, *see Ornelas et al v. United States,* 517 U.S. at 696-97;

> "[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint,* 456 U.S. 273, 289 n. 19 (1982).

Where the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been relunctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." *See Miller v. Fenton,* 474 U.S. 104, 114 (1985)

6. De Novo Review Is The Only Appropriate Standard For Cases Involving IDEA Statutory Interpretation

The appellate standard of review is critically important to the outcome of a case.[9] A

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[9] "[I]f the question of law were reviewed under the deferential standard . . . which permits reversal only for clear error, then [we] would affirm; but, if [we] were to review the determination under an independent de novo standard, [we] would reverse." *See Matter of McLinn,* 739 F.2d 1395, 1397 (CA9 1984).

consistently applied appellate standard of review should eliminate the varied results occuring with IDEA eligibility cases,[10] provide equal *access* for *all* children with disabilities and support the unitary system of law required by this Court.

In *Rowley*, this Court faced the issue of "what is meant by the [IDEA's] requirement of a 'free appropriate education.' This case involves the appropriate standard of review in testing for IDEA eligibility. The Respondent's contend the inquiry is identical. However, *Rowley* did not so hold. *Rowley* did not impose either its "due weight" deference or "educational benefit" analysis in the testing for IDEA eligibility. At least four court of appeals concur. *See* Pet. 21-22.

7. Nothing About This Case Would Result In A Fact-Bound Decision From The Court Or Prohibit It From Deciding The Question Presented

A case will typically make a poor vehicle for deciding a legal issue when the issue is fact-bound, see Robert L. Stern *et al.*, Supreme Court Practice 455 (8th ed. 2002) (suggesting that certiorari is unlikely when "the decision below turns upon its own facts" and, as a result, "will affect few others besides the litigants"); *accord, id.* at 459. or when other grounds for affirmance may preclude the Court from reaching the question presented, *see id.* at 455. Neither concern is present here.

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[10] See Mark C. Weber, *The IDEA Eligibility Mess*, Buffalo Law Review, Vol. 57:1 83 (2009).

First, Respondent's [only] assertion that this case is not the proper vehicle for a grant of certiorari, "because the Seventh Circuit properly decided the Petitioners' case," BIO at 27 is essentially a restatement of the question presented; whether the *Rowley* review standard is proper when testing for IDEA eligibility? Clearly, this is the only fact germane to the legal issue presented. All other underlying facts and all other documents from the record below, although providing context to the other disputes between the parties, are legally irrelevant to the IDEA eligibility question presented.

Second, this question affects thousands of disabled children in their ability to *access* educational services, and receive the IDEA's promise and guarantee. In the situation presented here, where a fully mature conflict in the circuits is squarely presented, and there is no chance that the issue as it affects the parties before the Court will be resolved without the Court's intervention – there is no reason to put this important review off for another day.

CONCLUSION

The petition for a writ of certiorari should be granted.

February 19, 2010 Respectfully submitted,

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